

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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GAVRIELA BROTHERS LLC,) Civil Action
a California Limited)
Liability Company,)
Plaintiff,)
v.)
SOTO MASSINI (USA) CORPORATION,)
a Delaware Corporation, and THOMAS)
PICHLER, an individual,)
Defendants.) No. 18-462-MN

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Wilmington, Delaware
Monday, April 2, 2018
3:05 p.m.
Telephone Conference

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BEFORE: HONORABLE GREGORY M. SLEET, Senior Judge, U.S.D.C.,
District of Delaware

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APPEARANCES:

AMY M. DUDASH, ESQ.,
MICHAEL LYONS, ESQ., and
EHSUN FORGHANY, ESQ.
Morgan, Lewis & Bockius LLP

Counsel for Plaintiff

1 APPEARANCES CONTINUED:

2 STEPHEN B. BRAUERMAN, ESQ., and
3 SARAH BRUSSIÈRE, ESQ.

4 Bayard LP

5 -and-

6 STEPHEN LOBBIN, ESQ.

7 SML Avocati, P.C.

8 Counsel for Defendants

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10 THE COURT: Good afternoon, counsel. Who is on
11 the line for the plaintiff, please?

12 MS. DUDASH: Good afternoon, Your Honor. This
13 is Amy Dudash from Morgan, Lewis and Bockius. With me on
14 the line also for plaintiffs is Michael Lyons.

15 MR. FORGHANY: Also Ehsun Forghany.

16 THE COURT: Thank you.

17 For defendants.

18 MR. BRAUERMAN: Good afternoon. Thank you, Your
19 Honor. Steve Brauerman here from Bayard, and Sarah
20 Brussiere. We are joined by Steve Lobbin from the Avocati
21 Law Group, who, with Your Honor's permission, will address
22 the Court. We have not yet moved Mr. Lobbin's pro hac vice.
23 That is to be served today. I apologize for that, Your
24 Honor. The timing, we just haven't had a chance to complete
25 the certification yet.

THE COURT: That is fine. Mr. Brauerman, who
was the second lawyer you introduced?

15:04:46 1 MR. BRAUERMAN: I mentioned Sarah Brussiere.

15:05:01 2 She works for my office.

15:05:02 3 THE COURT: Thank you. Mr. Lobbin is going to
15:05:07 4 handle this for the defense.

15:05:09 5 Mr. Lyons, you are going handle this for
15:05:10 6 plaintiff?

15:05:12 7 MR. LYONS: That's correct, Your Honor.

15:05:13 8 THE COURT: Counsel, let's go off the record
15:05:16 9 right now.

15:05:17 10 (Discussion off the record.)

15:17:44 11 THE COURT: At this point, counsel, particularly
15:17:50 12 given Mr. Lyons' statement of position or statements of
15:17:57 13 plaintiff's position, I am not certain that Mr. Lobbin has
15:18:02 14 really been able to, that you have been able to, as you have
15:18:09 15 just said, familiarize yourself as completely as you would
15:18:13 16 like to with things like the prior art and other things of
15:18:16 17 that nature that may help inform a business resolution of
15:18:23 18 the matter.

15:18:26 19 I am concerned about continuing to enjoin the
15:18:34 20 distribution of the funds. I am also concerned about the
15:18:38 21 issue of a bond. If this is going to -- I am prepared to
15:18:45 22 dissolve the TRO and to change this into a preliminary
15:18:52 23 injunction and consolidate it for a trial on the merits if
15:18:56 24 counsel feels that is do-able by the date that we have
15:19:02 25 assigned. What is it, the 20th? I think you would be

1 hard-pressed to get ready by whatever the date is.

2 What is it?

3 Counsel, I don't have the date in front of me.

4 When have I scheduled this for a hearing, Mr. Lyons?

5 MR. LYONS: Your Honor, it is currently
6 scheduled for April 16.

7 THE COURT: That seems pretty aggressive. I
8 will hear from both of you on that. Go ahead, Mr. Lyons.

9 MR. LYONS: Well, we are prepared to go forward,
10 Your Honor, as we filed for both a TRO and a preliminary
11 injunction in a single paper. We are prepared to go
12 forward.

13 This is a design patent, so I think the
14 infringement analysis is based on the ordinary observer
15 test. I think the images are a lot of what the parties need
16 to focus on and that's readily accessible. Just from
17 looking at their papers, they have obviously done a lot of
18 homework in this space on what's been going on in this. So
19 I think they are well on their way in developing their case.
20 I think we can be ready to go.

21 I think it makes sense to move quickly in this
22 case because, as I said, it's in an unusual posture where
23 somebody has -- there isn't an ongoing business. They are
24 trying to launch a business on what we believe is an
25 infringing campaign. So there are some unique features here

1 to this. That is why we think it's appropriate to freeze
2 this while the Court gets an opportunity to look at it in
3 detail.

4 THE COURT: Let me revise what I just said a
5 moment ago.

6 It seems that it would make more sense to
7 contemplate a hearing on the motion for a preliminary
8 injunction on the appointed date rather than a trial on the
9 merits.

10 Mr. Lobbin, what is your view?

11 MR. LOBBIN: Thank you, Your Honor.

12 Well, a couple things. I am going to be
13 traveling the 16th. It is difficult for me for many
14 reasons, not just schedule, but we haven't looked at the
15 prior art. This is a very important issue.

16 In Footnote 2 of my brief, Page 2 of the brief
17 we filed yesterday, we note that in order to get preliminary
18 relief the plaintiff has the burden to assess validity, and
19 they didn't make any effort to do so. They just said we
20 don't know of any prior art.

21 We need to dig into that issue, we need to
22 prepare briefs, assessing the merits properly, and we are
23 not going to be prepared to do that in a couple weeks.

24 What I am hearing is that perhaps Your Honor is
25 inclined to keep the TRO in place. In that circumstance, we

1 are going to have to have an urgency to get this done sooner
2 rather than later.

3 THE COURT: I am not inclined to keep the TRO in
4 place.

5 MR. LOBBIN: Then if we are free to do business,
6 we will make every effort to get in front of you at the
7 earliest practical date, given the briefing that needs to be
8 done, the analysis we need to do, and my schedule, which
9 perhaps could be as early as April 23rd, not the 16th,
10 unfortunately, and get this heard on the preliminary
11 injunction.

12 THE COURT: Again, let me be clear what I am
13 directing. That would be not a trial on the merits, but a
14 hearing on the preliminary injunction, what will be perhaps
15 the preliminary injunction. Both counsel, you understand
16 that. Right? I might have said otherwise earlier.

17 MR. LYONS: It is our understanding it would be
18 a preliminary injunction hearing, Your Honor

19 THE COURT: Mr. Lobbin, you understand that.

20 MR. LOBBIN: Yes, Your Honor. I was just
21 concerned on clarification, looking at what was going to
22 take place in the interim.

23 THE COURT: Let's talk about that for a moment.

24 As I think you correctly point out, Mr. Lobbin,
25 the TRO, really, and, Mr. Lyons, I think you will concur,

1 was directed at preventing the transfer of the 694 thousand
2 dollar and change from the kick starter campaign. It was
3 alleged, there was a concern about it being removed from the
4 control or the Court's jurisdiction.

5 I don't necessarily have that concern anymore,
6 having listened, reviewed defendants' papers and now had
7 both of you on the phone.

8 I am rather inclined to Mr. Lobbin's point of
9 view that I should not be enjoining the transfer of that
10 money. Mr. Lyons, I will let you go first and I will hear
11 from Mr. Lobbin.

12 MR. LYONS: Well, Your Honor, one thing we did
13 file just before this hearing is a statement that was posted
14 by the defendant, Mr. Pichler on the kick starter website,
15 where he announces that he doesn't need these funds and that
16 he is fully funded. I don't think there is any harm to him
17 if these funds are not put into service in the infringement.
18 Our concern remains, this is part of the operations. It is
19 an Italian corporation. Mr. Pichler said the businesses
20 that he has run are based in Austria. His declaration
21 reflects that he is in Austria right now, I think.
22 His stated intention is to put this money into the
23 infringing operation. It doesn't seem to us -- we are
24 talking about two weeks or three weeks before a preliminary
25 injunction hearing. According to defendant, he is not going

1 to be harmed if that money is frozen. We think that is the
2 appropriate thing to do with it under the circumstances,
3 when it was generated from a campaign that we think we are
4 going to demonstrate was based on infringement, and
5 therefore, that we are entitled to a preliminary injunction.
6 If the TRO is dissolved, it's not clear what effect the
7 injunction would be able to have at that point.

8 THE COURT: Mr. Lobbin.

9 MR. LOBBIN: Your Honor, respectfully, the
10 Court's exercise of the TRO power is based on irreparable
11 harm to plaintiff, not whether we would be harmed. I don't
12 know what statement he is talking about, frankly. I don't
13 know that it's actually been authenticated or what it is.
14 It sounds like it's some post online supposedly by my client
15 saying he has got plenty of money. So that doesn't
16 necessarily mean that he doesn't need his investment capital
17 to move forward.

18 I think the status quo has to be maintained,
19 which is we go with the lawsuit that is filed, we are out
20 there competing. If they can prove they deserve a
21 preliminary injunction, I assume the preliminary injunction
22 would be along the lines of defendants may not use
23 infringing designs, not that defendants may not use
24 investment capital for otherwise lawful business purposes.

25 I don't think that it would be appropriate to

1 force the defendants just to sit still for three, four weeks
2 or a month until we resolve the preliminary injunction
3 issue. Obviously, our position is as you initially
4 explained it, the TRO would go away, we set a course for a
5 preliminary injunction hearing and get that done.

6 THE COURT: Counsel, hold on just a second.

7 (Pause.)

8 THE COURT: Counsel, I am going to take my foot
9 off the accelerator on this case, perhaps what plaintiff
10 will view in a profound way. But not only am I going to
11 dissolve the TRO, I don't see the basis for any contention
12 at this point -- you can contend what you want to contend,
13 finding that the harm that's been alleged here is
14 irreparable -- I am not going to enjoin legitimate
15 competition, in spite of what counsel for plaintiff says is
16 illegitimate. I am not prepared to draw that conclusion at
17 this point, just based upon what I have seen in the papers.

18 So we are going to dial things way back, as it
19 were. I am going to take the hearing off the schedule as
20 well. And we are going to put this on track for assignment
21 to -- it will be a different judge. As you may know, I am
22 going to be leaving the Bench, or I may keep the assignment
23 and manage the case to a point at which time it will be
24 reassigned to a judge for trial. But that's yet to be
25 determined. We are going to put it on the wheel and see

15:29:36 1 where it lands.

15:29:38 2 That's the Court's ruling.

15:29:41 3 No, I am not going to require a bond. There is
15:29:43 4 no need to require a bond, because I am reversing myself on
15:29:47 5 the grant of the injunctive relief.

15:29:48 6 Anything else, counsel?

15:29:55 7 MR. LOBBIN: Thank you, Your Honor.

15:29:57 8 MR. LYONS: I understand, Your Honor. Thank
15:30:00 9 you, likewise.

15:30:00 10 THE COURT: All right. Take care, counsel.

11 (Matter adjourned at 3:28 p.m.)

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13 Reporter: Kevin J. Maurer

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